IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

No. 2802.

UNITED STATES OF AMERICA,
Appellant,

vs.

SUI JOY,
Appellee.

No. 2801.

UNITED STATES OF AMERICA,
Appellant,

vs.

WONG YUEN,
Appellee.

No. 2800.

UNITED STATES OF AMERICA,
Appellant,

vs.

CHING LUM,
Appellee.

BRIEF OF APPELLEES.

Upon Appeal from the United States District Court for the Territory of Hawaii, in the Above-entitled Cases.

E. A. MOTT-SMITH,
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Attorneys for Appellees.

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Brief of Appellees.

Upon the Appeal from the United States District Court for the Territory of Hawaii, in the Above-entitled Cases.

By stipulation approved by the Court, it has been agreed by and between the counsel representing the parties that one brief may be filed by the appellant and one by counsel representing the three above-named appellees, and pursuant to such stipulation

this brief, in reply to that of the Government, is filed to cover each case.

STATEMENT OF THE CASE.

The appellees agree to and adopt the statement of the case made by the appellant except in the following particular:

The last clause in the translation of the cabled instructions for the arrest of the appellees, namely, "Alien found practicing prostitution after entry," presumably refers to others named in the instructions and directs their arrest on that charge, and has no reference to the appellees.

Law Involved and Argument.

The Government rests its case against the appellees on two grounds:

(1) That the appellees, although residents of the Hawaiian Islands before annexation, *entered* the United States through annexation, and

(2) That the charge placed against the appellees "applies to *any alien* found in the United States, and it matters not under what circumstances they came."

(Appellant's Brief, page 7.)

We take it that the Government bases the above contentions under its Assignment of Errors numbered 5, 6, 7 and 8, which, while inartistically drawn by counsel other than those now appearing for the Government, may reserve the questions now presented for review. The remaining assignments of error are not argued by the Government, and we assume that they have been abandoned. We so as-

sume because they relate partly to questions of procedure as to the issuance of the writs—questions which are not now raised by the Government—and in part are drawn on the erroneous theory that a hearing on the charges had taken place before the immigration officers, and that the latter had found the charges established.

As stated by the Government (Brief, page 3), the Court below necessarily took the view that the facts of these cases did not give the immigration officers jurisdiction, otherwise the Court could not have entertained the petitions until the aliens had exhausted their remedies with the "Department of Labor," citing

U. S. vs. Sing Tuck, 194 U. S. 161.

The following cases also are authority for the proposition that the question of the jurisdiction of the immigration officers have been raised *in limine,* a person arrested may have the benefit of a writ of *habeas corpus,* and that the action of the Court below, in issuing the writs, was authorized and not premature:

Gonsalves vs. Williams, 192 U. S. 1, 13, 15.
U. S. vs. Wong Kim Ark, 169 U. S. 649.
Ex parte Royall, 117 U. S. 241.
Whitfield vs. Hanges, 222 Fed. 745, 751.

I.

The appellees contend that Section 3 of the Act of 1907, as amended by the Act of March 26, 1910, Chapter 128, Section 2, does not apply to them by reason of the fact that they did not enter the United States within the meaning of the Immigration Acts.

The appellees are and, as is conceded by the Government, have been for many years prior to their arrest alien residents of the Hawaiian Islands, and were such at the time of the annexation of the Islands to the United States.

The provisions of the statute under which the appellees were arrested presume an actual entry and landing in the United States, and are only applicable to such aliens as do enter the United States within the meaning of the statute.

Section 3 of the Act of 1907, as amended, reads in part as follows:

> "Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution *after such alien shall have entered the United States,* or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance-hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections 20 and 21 of this Act."

By Section 22 of the Act it is provided that the Commissioner-General of Immigration shall, under the direction of the Secretary of Labor, "have charge

of the administration of all laws relating to the *immigration* of aliens," and that "he shall establish such rules and regulations and prescribe such forms * * * as he shall deem best calculated for carrying out the provisions of the Act." Pursuant to the authority so conferred the Secretary of Labor and the Commissioner-General established in respect to the procedure to be adopted in the arrest and deportation of aliens the following rule:

> "Rule 22. Sub. 2. Application for warrant of arrest.—The application must state facts bringing the alien within one or more of the classes subject to deportation *after entry.* The proof of these facts should be the best that can be obtained. The application must be accompanied by a *certificate of landing* (to be obtained from the immigration officer in charge at the port *where landing occurred*) or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained."

We submit, as found by the Court below, that the officials named construed the words of Section 3 of the Act of 1907, as amended, *"after such alien shall have entered the United States,"* as meaning an actual entry or landing in the United States, and

that subdivision 2 of Rule 22, quoted above, in providing for an application by immigration officers for authority to arrest an alien suspected of being unlawfully in the United States, and in requiring that the application should be accompanied by a certificate of landing, referred to nothing less than an actual landing in the United States. The Court below held that the above construction of the statute and rule is rendered "still more positive" (Tr., p. 50) by the certificate of landing required by the rule to accompany the application. (A copy of such certificate of landing is attached to this brief, marked Exhibit "A," and made a part hereof.)

The rule and form of certificate show that the fact that an alien, whose deportation is sought, has landed at some port of entry, or has at some time come in at some place into the United States as an *immigrant,* is a fact, proof of which must be made, before proceedings can be taken for his arrest and deportation. The certificate calls for detailed particulars as to the country from which the alien emigrated; the date and port of his arrival in the United States; his method of transportation thereto—the name of the vessel and line by which he came; his destination —where he expected to make his new home; whether he was ever in the United States before, and whether he was inspected at time of arrival. The exactness and nature of the information called for in the certificate shows beyond all doubt that the executive officers who framed it construed the Act which they were enforcing as applying only to an alien who was or at some time or other had been an immigrant,

and who actually and physically moved from a foreign country to the United States.

The construction thus put upon the statute by the executive officers is entitled to great consideration.

> "The best exposition of a statute is that which it has received from contemporary authority. Such is entitled to great weight."
>
> "Of great dignity is the practical construction put upon an act by the governmental officers particularly charged with its execution."
>
> Endlich, Interpretation of Statutes, Secs. 357–360.

The words "enter" and "landing" have not, in matters of immigration, acquired any technical meaning, but are used in their ordinary, primary and usual meaning; to *enter* the United States means to make a way into, go or come into the United States.

"The word 'immigration' means to immigrate, to come into a country of which one is not a native."

22 Atty. Gen. Op. 353.

We claim that the words "enter," "entry," and "landing" were used by Congress and the executive officers in their ordinary and usual significance, and we are at a loss to understand the Government's contention that the Court below "has given the said rules a wrong interpretation and a prominence uncalled for." (Brief, page 4.)

AUTHORITY OF CONGRESS OVER ALIENS.

The authority of Congress over aliens rests on either or both of two grounds:

(1) The principle that every sovereign nation has the power as inherent in sovereignty and essential

to self-preservation to not only forbid the entrance of foreigners but also to expel and deport them, and that that power is vested in Congress;

(2) The power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, the coming and bringing of persons into the ports of the United States.

The first principle above enunciated was declared in Fong Yue Ting vs. U. S., 149 U. S. 697, when the constitutionality of the Act of Congress of 1892, requiring certificates of residence from Chinese and providing for the deportation of those not having such, was passed upon. While admitting the general principle three of the Justices of the Supreme Court dissented in very able opinions from the proposition that the power to deport was vested in Congress and could be delegated by it to executive officers, and from one of the latest decisions of that Court—Tiaco vs. Forbes, 228 U. S. 549, decided in May, 1913—it would appear as if the power of Congress to exercise this sovereign right is not accepted without reserve.

> Holmes, J.: "It is admitted that sovereign states have inherent power to deport aliens, and *seemingly* that Congress is not deprived of this power by the Constitution of the United States."

The Act of 1907 is not, however, a Deportation Act, but is an Immigration Act.

On the other hand, the authority of Congress to exclude aliens under the commerce clause and to exclude those who after admission and entry are found

to be unlawfully in the country, is well established by a long line of cases beginning with Chae Chan Ping vs. U. S., 130 U. S. 581. The constitutionality of the Acts of Immigration under which Congress not only regulates the admission of aliens but prescribes conditions upon which those who have sought and obtained admission may remain in the country has been uniformly upheld. See

Japanese Immigrants' Case, 189 U. S. 86.

> "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law * * * are principles well established by the decisions of this Court."

The terms and conditions upon which aliens after admission may remain in the country have been made by successive sessions of Congress more drastic and severe. The conditions were imposed in order to enable the officials to determine the fitness of the aliens admitted.

Frick vs. Lewis, 195 Fed. 693, 699.

When the Japanese Immigrants' case was decided the period within which an alien might be deported was one year. The statute under review in the case of Keller vs. U. S., 213 U. S. 138, made the limitation three years. In that case Holmes, J., said:

> "For the purpose of excluding those who *unlawfully enter* this country Congress has

power to retain control over aliens long enough to make sure of the facts'';

and intimated that in his opinion the three year period was too long, but that he was not prepared to say so against the judgment of Congress.

Whatever the power of Congress may be in respect to aliens, the only power it exercised in the Immigration Acts was in respect to such aliens who had actually entered and landed in the United States, and over whose actions and conduct, no matter at what time they had entered and landed, it determined to retain control. The control of conduct of aliens who had at any time entered the United States within the meaning of the Immigration Act (and that meaning is such as the ordinary significance of the language used conveys), was the purpose and object of Congress in passing those acts, and while up to the time of the amendment of 1910, such control was limited to a period of three years after entry, whether an original entry or re-entry, by such amendment the limitation of the period of control was eliminated, but the pre-requisite to the exercise of such control, namely, entrance into the United States, was retained. That the various Immigration Acts have reference solely to aliens who were immigrants and who made an actual landing and entry in the United States, and that the purpose of Congress was to retain control of such persons only as were alien immigrants, see

Japanese Immigrants Case, 189 U. S. 86;
Lapina vs. Williams, 232 U. S. 78;
Lewis vs. Brick, 233 U. S. 291;

Low Wah Suey vs. Backus, 225 U. S. 460;
Keller vs. U. S., 213 U. S. 138;
Zakonaite vs. Wolf, 226 U. S. 272;
Bugajewitz vs. Adams, 228 U. S. 584;
Bouve, Exclusion and Expulsion of Aliens, page 150, and
Report of the Immigration Commission, 1910.

All of the cases cited above recognize that the Act of 1907 and the earlier Acts of like nature were strictly Immigration Acts dealing with persons who had made an actual entry and landing in the United States.

Bouve, in his work above cited, after enumerating several other classes of aliens subject to the operation of the Act of 1907, as amended by the Act of 1910, covering persons excluded absolutely because of physical or moral disability and those who suffering from some physical disability are admitted conditionally, classifies the rest as follows:

> "Those who after having been permitted to enter, shall within three years after the date of such entry become public charges from causes which existed prior to such landing, those who shall within that period have been found by the Secretary of Commerce and Labor to be unlawfully here, all those who, being within the United States may at any time *after entry* and for certain specified causes be deemed to be unlawfully in the United States."

In support of our contention reference is also made to the titles of the various Acts covering this

subject, a list of which in chronological order appears in the margin of the report of the case of Lapina vs. Williams, *supra.* Such reference is always admitted as throwing light upon the purpose or objects of legislation in case of any doubt arising as to its construction.

The appellees did not *enter* the United States within the meaning of the Immigration Acts.

On July 7, 1898, Congress passed a joint resolution whereby the Hawaiian Islands were annexed as a part of the territory of the United States, and became subject to the dominion thereof, although the actual and formal cession of the sovereignty was not made until August 12, 1899. When this cession was made the Government of the Hawaiian Islands was a republic, and at that time the appellees had been for many years resident aliens in the Islands. They held certain rights as domiciled residents of Hawaii, and with those rights the United States, at the time of annexation, did not attempt to interfere. They were left unmolested in the enjoyment of such rights. By the cession they came as an integral part of the people of Hawaii under the dominion of the United States. They were absorbed by the United States by a process which can in no sense of the word be called "immigration" and by no act of theirs which could come within any definition of the word "enter." The process of absorption was purely involuntary on their part. They did nothing. They remained where they were, and the land in which they were

resident became by operation of the cession of sovereignty a part of the United States.

The appellees do not claim that Congress intended to grant some aliens greater rights than others, or to give aliens in the Hawaiian Islands the right to engage in prostitution and at the same time deny aliens on the mainland that privilege. In fact, they do not claim that the practice of prostitution is either a *right* or a *privilege*. What they do claim is that Congress has expressed its will as to aliens who have entered the United States within the meaning of the Immigration Acts, that it is silent as to others, and that as the appellees never so entered, the provisions of section 3 of the Act of 1907, as amended by Section 2 of the Act of 1910, are not applicable to them.

II.

The Government's second contention is that by the provisions of Section 3 of the Act of 1907, as amended, the idea of an entry or a landing is eliminated except as to aliens practicing prostitution. (Brief, pages 6 and 7.)

This contention is, we submit, unsound for at least two reasons:

(1) The words of the section "after such alien shall have entered the United States" follow the words "any alien who shall be found (1), an *inmate of,* or (2) *connected with the management of a house of prostitution* or (3) *practicing prostitution.*" Hence, these words, "after such alien shall have entered the United States," must and do apply with equal force to persons found inmates of, to persons

connected with the management of a house of prostitution, as to persons practicing prostitution. No reading of the statute can possibly make these words applicable solely to aliens practicing prostitution. The Congress of the United States made this clear in the amendments to the Act of 1907 by expressly changing the opening words of the paragraph in the Act of 1907, "Any woman or girl," and the later words, "after *she* shall have entered the United States," to read in the Act of 1910, "Any alien * * * after such alien shall have entered the United States."

(2) Congress, while eliminating the time limit within which it might control aliens, expressly retained the idea of entry or landing. If it had intended to extend the scope of the Act beyond the field of immigration instead of amending the clause in the Act of 1907, by striking out the time limit merely and changing the phraseology of the clause, it could and would easily have stricken the whole clause. It read, in the Act of 1907, "at any time within three years after *she* shall have entered the United States," whereas in the Act of 1910, the time clause was stricken out, the word "she" eliminated, and the clause was made to read, "after such alien shall have entered the United States." These changes show that a clause covering entry was in the mind of Congress, and was intentionally retained by it in the Act.

It may be that Congress did not have in mind the case which has now arisen, but the applicability of

the statute in any case must be decided by the language which Congress used.

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."
>
> U. S. vs. Goldenberg, 168 U. S. 95, 152.

The language of the statute undoubtedly presumes an actual landing and entry by an alien over whose conduct it assumes to exercise control. In the section in which the words, "after such alien shall have entered the United States," occur, Congress amplified and enlarged the class of offenders in any way connected with the evil of prostitution, and the words following the words above quoted were intended, we submit, to show that the design of Congress was to make more definite and certain those against whom its legislation was directed. For instance, while the words "inmate of" and "connected with the management of a house of prostitution" would ordinarily be held to include persons employed in or residing in the house, or those managing the house and deriving benefit therefrom, Congress, so that no judicial fineness of distinction might be indulged in, cleared the ground by specifically mentioning those deriving benefit from the earnings of prostitutes or those employed in, by, or in connection with any house of prostitution or other resort where prostitutes are wont to gather. Congress had in mind mainly the

elimination of the time limit and the retention of the requisite of entry, and was not evidently concerned over the grammatical phraseology of the clause. Its meaning, we contend, was that "any alien who, after such alien shall have entered the United States," may do any of the prescribed acts shall be liable to deportation, and not that an alien connected with the management of a house of prostitution must first have *entered,* while one who was employed in connection with a house of prostitution need not have entered. Such a construction, we claim, would be absurd on its face.

Law On Bew vs. U. S., 144 U. S. 47.

We agree with the Government in the contention that the Immigration Act applies alike to all aliens, if it is understood that by "all aliens" is meant all aliens who have entered. Without this qualification the Act does not apply to all aliens, and a single illustration will suffice to show this. By the Act of March 2, 1907, Chap. 2534, 34 Stat. at L. 1228, an American woman, marrying an alien, becomes an alien. In the case of such a woman who had spent all her life in the United States and who was guilty of any of the acts referred to in Section 3 of the Immigration Act, which would render an alien immigrant liable to deportation, the Act would not be applicable for the reason that deportation could not be enforced. This illustration, we submit, shows clearly that Congress did not make the statute applicable to all aliens, but solely to aliens who have entered the United States at some time, probably having this and similar exceptions in mind.

In conclusion, the appellees submit that their contentions should be sustained, the decision of the Court below affirmed, and the appeals dismissed.

Respectfully submitted,

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Attorneys for Appellees.

EXHIBIT "A."

"Form 564.

Certificate as to Landing of Alien.

(To accompany application for warrant of arrest.)

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

————————, 190—.

I hereby certify that I have examined the records of the immigrant station at ——— with reference to the record of the landing or entry of ———, an alien, and that the following facts relative to such landing or entry are disclosed by said records.

(1) Name of alien, ———; age, ———; sex, ———.

(2) Race, ———; country whence alien came, ———.

(3) Exact date and port of arrival in the United States, ———.

(4) Name of vessel and line, ————————.

(If alien arrived *via* Canada or Mexico, so state.)

(5) Destination, ———.

(6) Occupation, ———; money brought, $———.

(7) By whom passage paid, ———.

(8) Whether ever in United States before, ———.

(9) Whether inspected at time of arrival, ———.

(If held for special inquiry, so state.)

Remarks: ————————————————————

————————————————————————————

(Signature)————————————.

(Official title)————————————."